

PORT ANGELES BUSINESS ASSOCIATION
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Ann Wessel
Washington State Department of Ecology
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June 26, 2012

Dear Ms. Wessel,

Please find following the formal comments of the Port Angeles Business Association on the proposed Water Resources Management Program for the Dungeness portion of the Elwha-Dungeness Water Resource Inventory Area (WRIA) 18, Chapter 173-518 WAC.

We are a business organization of approximately 80 members with the purpose of promoting business in the Greater Port Angeles Area and increasing business growth and developing jobs. As such, we have examined with particular interest the Preliminary Cost Benefit and Least Burdensome Alternative Analyses and the Small Business Economic Impact Statement. We note that State law requires under RCW 34.05.328 (1)(d) that *"probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs"* and under RCW 34.05.328 (1)(e) that *"the rule being adopted is the least burdensome alternative for those required to comply with it"*.

After thorough analysis of the proposed rule, the Preliminary Cost Benefit and Least Burdensome Alternative Analyses and the Small Business Economic Impact Statement, we have concluded that the rule as currently proposed probably results in costs larger than benefits, and that it is not the least burdensome alternative. As a result, we believe that the rule is in violation of RCW 34.05.328 and, thus, contrary to State law, which always supersedes provisions of the Washington Administrative Code where in conflict. Our reasons are detailed below.

1. The cost benefit analysis suffers from several fatal flaws.
 - A. It does not include among costs the decrease in property value of the properties subject to new restrictions. This decrease is larger than just the amount of estimated mitigation fees, because under the rule as proposed there is no ironclad guarantee that in all affected watersheds at all times there will be available either reserves or mitigation credits at a price known in advance. Uncertainty in the business world has a very real, and often considerable, cost attached to it, ignored by your analysis.
 - B. It does not include among the costs the effect on the local economy of the decrease in building and ancillary (well drilling, landscaping, etc.) activities resulting from the increased cost of a home due to the need to purchase mitigation credits for domestic use and landscape watering. The only time increased cost does not result in decreased demand is when the good in

question has a price elasticity of demand of zero. This clearly is not the case for houses and landscaping. The real estate, building and related industries account for about one quarter of all private employment and economic activity in Clallam County. Your cost benefit analysis and Small Business Economic Impact Statement need to be revised, using the correct price elasticity of demand for these goods, to reflect the impact of the rule on the realty, building, landscaping and related industries, and the impact of the resulting decreased sales tax receipts and increased unemployment.

- C. One of the crucial elements of your cost benefit analysis, without which benefits would not exceed costs, is the assumption of \$22.3 million to \$66.9 million in benefits from avoided litigation. Given that there currently is neither pending nor threatened litigation these numbers are vastly inflated. There is no support whatever for your assumption of a "baseline risk of a lawsuit ... [of] 14.1 – 27.7 percent". Assuming costs of litigation between 50 and 150 times of the estimated \$400,000 it might cost to purchase the required 0.77 cfs of senior water rights needed to compensate for expected future permit exempt well usage, which would be the subject of this hypothetical litigation, flies in the face of common sense.
- D. Similarly, your assumed benefit of \$20.5 million from protecting existing salmon restoration has no basis in fact. This amount is a sunk cost of an investment in salmon restoration made in the past, on its own merits, without any contemplation of this rule. To the extent adoption of this rule would benefit salmon habitat, those benefits are captured in the assumed \$3.8 million to \$6.8 million from "avoided fish losses". Adding the \$20.5 million to these amounts constitutes double counting.
- E. It does not include the estimated costs of the litigation that quite likely will ensue if the rule is promulgated without addressing satisfactorily the concerns raised in this comment letter. You need to estimate those costs, for Ecology (and ultimately the taxpayer), the County, and the industry and property owners groups that would be involved in such litigation, as well as the cost of uncertainty and delays in development during the pendency of this litigation.
- F. Ecology's own economist, Mr. Hoff on March 19, 2012 issued the following finding: *"This is a formal notification to the WRIA 18 rule writers that the evaluated Draft Rule presented on March 15 for the Dungeness watershed does not meet the legal requirements outline in RCW 34.05.328 (1)(d) of the Administrative Procedures Act."* When Mr. Hoff refused to buckle under to political pressure as to how his economic analysis should be prepared and was removed from the rule making team, the analysis was prepared in just a few weeks by employees lacking any familiarity with the WRIA 18 rulemaking process, resulting in this flawed final result.

We believe that these defects in substance and in process, quite possibly involving serious violations of the Administrative Procedure Act, can only be cured with new Preliminary Cost Benefit and Least Burdensome Alternative Analyses and Small Business Economic Impact Statement, incorporating the above comments.

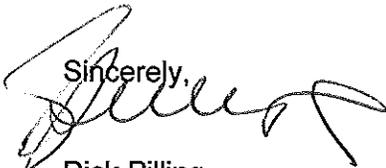
- 2. The proposed rule does not constitute the least burdensome alternative, and thus runs afoul of RCW 34.05.328 (1)(e).
 - A. A much less burdensome alternative would be to have the State of Washington fund through its capital budget and purchase in advance the required mitigation

credits, without charging individual property owners for water use from their permit exempt wells, similarly to the way it is being done in Skagit County. This would, for a relatively minimal expenditure (as little as \$300,000 to \$400,000 for 0.77 cfs) remove the great majority of the costs that currently cause this rule to fail the RCW 34.05.328 (1)(d) test. We consider it essential that the rule be made contingent upon the necessary funding being appropriated and spent to purchase the required mitigation credits, and that the rule be automatically suspended by its terms if this does not occur during the next legislative session. Your own economist Mr. Hoff wrote on March 2, 2012 that *"What usually made the Benefits outweigh the costs in past rules is we gave away water in a reserve for another 20 years with some conditions. In this rule we do not do this so it all falls on the cost side of the balance sheet."*

- B. The metering requirement also runs afoul of the least burdensome alternative rule. There are now sophisticated techniques for estimating well pump usage through residential electric metering, something that would clearly be less burdensome than spending \$1.4 to \$2.1 million on well meters. Your employee Robert Barwin's e-mail dated March 12, 2012, in which he wrote *"Given the relatively low costs of the metering requirement, I didn't even bother with describing a metering v. no metering alternative"*, shows there never was the serious consideration of less burdensome alternatives required by RCW 34.05.328 (1)(e) regarding a requirement expected to cost property owners millions of dollars.

We sincerely hope that you will take the time to address our comments by making the necessary changes to the rule and revising the Preliminary Cost Benefit and Least Burdensome Alternative Analyses and the Small Business Economic Impact Statement. We are concerned that if you were to pass the rule in its current form, against the opposition of local government, local business, and local property owners, it would only result in expensive and unproductive litigation.

Sincerely,



Dick Pilling
President, Port Angeles Business Association

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